JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 315

NEW ENGLAND TANK INDUSTRIES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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NEW ENGLAND TANK INDUSTRIES, INC.,
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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

New Enganld Tank Industries, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinion Below

The Opinion of the Circuit Court is reported at 302 F.2d 273. A copy of the opinion is appended hereto. Appendix A *infra.*

Jurisdiction

The Judgment was entered on April 27, 1962. A motion for rehearing, filed on May 11, 1962, was denied on May 15, 1962. The jurisdiction of the Court is invoked under 62 Stat. 928.

Questions Presented

1. Did the Circuit Court err in declining to consider an objection which though raised at the hearing before the Trial Examiner, was not again specified in the Exceptions to the Trial Examiner's Intermediate Report?

2. Are individuals, who are offered employment but who decline to accept the offer, preferring to withhold their services until others are given a similar opportunity, unfair labor practice strikers?

Statutes and Regulations Involved

Statute Involved

Portion of Section 188(c) of Title 29 of U. S. Code which reads:

> "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances." (Text of complete section set out in Appendix B *infra*.)

Regulation Involved

Section 102.46(b) of the *Rules and Regulations and Statements of Procedure of the National Labor Relations Board*, Series 8, page 15:

"No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding." (Text of complete section 102.46 set out in Appendix C *infra*.)

Statement of Case

1. On November 10, 1960, the Regional Director of the First Region of the National Labor Relations Board issued a complaint charging the Petitioner with violations of Section 8(a)(1) and (3) and Section 2(b) of the National Labor Relations Act as amended by refusing or failing to employ certain individuals for the reason that they joined or assisted the Union or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

A hearing was held before a Trial Examiner of the National Labor Relations Board on December 15 and 16, 1960.

At this hearing, Attorney for Petitioner sought to impeach and attack the credibility of a key witness of the National Labor Relations Board's General Counsel by cross-examining him concerning his prior conversation with a National Labor Relations Board agent about the same subject matter covered in his testimony in chief. The Trial Examiner interposed his own objection, stating that what the witness may have said to the Board agent was unimportant and not in issue. Counsel for Petitioner strenuously objected to this ruling.

Petitioner inadvertently failed to raise this question in its Exceptions to the Trial Examiner's Intermediate Report. For this reason the Circuit Court refused to consider the question of whether the Trial Examiner had committed prejudicial error.

2. The Trial Examiner in his Intermediate Report made the finding that three individuals who were offered employ-

ment by the Petitioner but who declined to accept the offer, preferring to withhold their services until other persons who never had been employees of Petitioner were given a similar opportunity, were unfair labor practice strikers.

Petitioner excepted to the finding but the Board upheld it. However, there was a strong dissenting opinion written by a member of the Board.

Upon the Board's petition for enforcement, the United States Court of Appeals for the First Circuit under the authority of Section 2112 of Title 28 of the United States Code enforced the NLRB's order.

Reasons for Granting the Writ

1. The Circuit Court has construed Section 10(e) of the National Labor Relations Act in such a way that it is in conflict with the applicable decisions of this Court. In *Marshall Field and Company* v. *NLRB*, 318 US 253, the Court says that it is sufficient if at any stage of the proceedings before the Board the objection was raised. *NLRB* v. *Cheney Lumber Co.*, 327 US 385 is in accord. In both of these cases, the objections were not to rulings made by the Trial Examiner at the hearing, but rather to findings in his Intermediate Report. Therefore, absent exceptions, there were no means by which the Board could be apprised of the objections. In the instant case, however, the objection was raised and strenuously argued before the Trial Examiner (Record Appendix, pp. 216-218) and the Board had the record before them when considering the Trial Examiner's Recommendations. It is also important to note that under Board practice, parties are allowed automatic exceptions to all adverse rulings made by the Trial Examiner at the hearing. Therefore, the Board was apprised of Petitioner's objection and the requirement of Section 10(e) as construed by this Court has been met.

With respect to the Board's regulation that "no matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding", Petitioner asserts that it goes beyond the scope of Section 10(e) as construed by this Court and is of no effect. All that is required is that at *some stage* of the proceeding the objection be raised. Petitioner did in fact raise the objection at the hearing before the Trial Examiner of the Board.

In addition, the policy behind the requirement of 10(e) is to give the reviewing court the benefit of the Board's presumed expertise in the field of labor law. It is important to note that the objection in question in the instant case is not one of labor law but rather, one involving the law of evidence, an area in which the Board possesses no expertise and in which the Court is far better versed.

2. With respect to the Circuit Court's determination that the three individuals who refused an offer of employment were unfair labor practice strikers, Petitioner asserts that an important question of Federal Labor Law has been raised which has not been, but should be settled by this Court.

In a dissenting opinion, NLRB member Rodgers stated:

> "It has long been recognized by the law,[3] in common understanding,[4] and heretofore the Board has

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[3] In *Jeffrey-DeWitt Insulator Co.* v *NLRB*, 91 F2d 134 (CA 4) and *Iron Moulders Union* v *Allis Chalmers Co.*, 166 F2d 45 (CA 7), the courts defined a strike as a "cessation of work by employees in an effort to get for the employees more desirable terms;" and in *The Point Reyes*, 110 F2d 608 (CA 5), the court found that the term "strike" contains two essential ingredients, namely, 'There must be the relation of an employer and employee, and there must be a quitting of work."

[4] Webster's *New International Unabridged, Dictionary, Second Edition*, defines a striker as "a workman who is on strike;" and defines a strike as an: "Act of quitting work; specif., such an act done by

never held to the contrary,[5] that to be considered a striker one must be an employee of the employer against whom the strike is directed, and there must be a cessation of work by the employee. Under the facts in this case, it is manifest that, neither of these essential elements are present with respect to Webster, Sarnacki, and Roix:

"Here, by rejecting the Respondent's offer of employment and by thereafter failing to report for work on October 1, Webster, Sarnacki, and Roix never became employees of Respondent. Having failed to establish an employee relationship, it is clear that they could not cease work or withhold their services within the plain meaning of the term "striker". Accordingly, having failed to meet those requirements necessary to be considered strikers, I am unable to determine, and the majority does not explain, how their subsequent picketing, even if in sympathy with those who were protesting Respondent's unfair labor practices, somehow converted the status of Webster, Sarnacki, and Roix, to that of unfair labor practice strikers."

Petitioner believes that Board Member Rodgers has correctly stated the law and that the decision of both the Board majority and that of the Circuit Court is contrary to law.

mutual understanding by a body of workmen as a means of refusing compliance with demands made on their employer; all stopping of work by workmen in order to obtain or resisting a change in conditions of employment." Black's *Law Dictionary* defines a strike as: "The act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused."

[5] In all those cases where the Board has found certain sympathy strikers to be protected under the Act, there was a clear employee-employer relationship existing. See e. g., *A. O. Smith Corporation, Granit City Plant*, 132 NLRB No. 9; *West Coast Casket Company, Inc.*, 97 NLRB 820, enforced 205 F2d 902 (CA 9).

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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Appendix A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 5920.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
NEW ENGLAND TANK INDUSTRIES, INC.,
RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
[133 NLRB No. 25]

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Samuel M. Singer, Attorney, with whom *Stuart Rothman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Joseph C. Thackery*, Attorney, were on brief, for petitioner.

George H. Foley, with whom *Hale and Dorr* was on brief, for respondent.

OPINION OF THE COURT.

April 27, 1962.

HARTIGAN, *Circuit Judge*. This is a petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 et seq.), for enforcement of its order issued against the respondent, New England Tank Industries, Inc., for alleged unfair labor practices occurring on a government owned gasoline pipeline between Searsport and Limestone, Maine, which respondent operates and protects.

In agreement with the Trial Examiner, the Board found

that respondent unlawfully refused to employ or reemploy forty-nine employees of its predecessor operator on the pipeline—the F. H. McGraw Company—because they were members of one of the two charging unions.[1] The Board also found that respondent unlawfully refused to reinstate three additional employees who had accepted employment but who then struck in protest against respondent's refusal to employ the forty-nine employees.

Respondent, a Massachusetts corporation, with affiliates in New Hampshire, Pennsylvania, California and South Carolina, operates pipelines and petroleum tank farms in connection with the transportation of aviation fuel and related products. In August, 1960 as a result of respondent's bid, it was successful in obtaining the contract for the operation of a two hundred mile long pipeline between Searsport and Limestone, Maine. This government owned facility was used to supply jet fuel and related gasoline products to two Air Force bases in Maine.

The contract for the operation and protection of the pipeline is negotiated on a year-to-year basis. During the contract year October 1, 1959 to September 30, 1960, the pipeline was operated by the F. H. McGraw Company. McGraw had in its employ all of the employees involved here, many of whom had either worked continuously on the pipeline since it was first established in 1953 or had several years of employment experience on the operation. The two unions involved in the present action had first won recognition as agents for the pipeline employees in 1958.

When the McGraw contract ended and the respondent assumed responsibility for the operation and protection of the pipeline, all but three[2] of the former McGraw employees

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[1] Independent Union of Plant Protection Employees in the Electrical and Machine Industry; and Oil, Chemical & Atomic Workers, International Union, AFL-CIO, Local 1-4-366.

[2] Their special status will be discussed *infra*.

had been refused reemployment by the respondent. The reason why these employees were denied employment poses the principal issue in this case. The charging unions contend and the Board so found that the former workers were denied employment for reasons relating to their union membership and activities, and that, consequently, respondent violated Sections 8(a) (1) and (3) by refusing to employ them. The respondent, on the other hand, contends that its decision not to hire the vast majority of the McGraw employees stemmed from a pattern of unexplained gasoline losses which had occurred on the pipeline in the months preceding the expiration of the McGraw contract. It argues that the extent of these losses could be attributed only to mismanagement or pilferage. In the attempt to remedy this situation, respondent maintains that it decided to proceed with an entirely new crew.

We must determine whether or not substantial evidence supports the Board's conclusion that the respondent's actions were primarily motivated by an anti-union *animus* for it is well settled that an employer who discriminates against applicants for employment because of their union membership or activities violates Section 8(a) (3) and (1) of the Act. See, *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 182-187 (1941); *Piasecki Aircraft Corporation* v. *N.L.R.B.*, 280 F.2d 575, 583-584 (3 Cir. 1960), cert. denied, 364 U.S. 933 (1961); *National Labor Relations Bd.* v. *Lamar Creamery Co.*, 246 F.2d 8, 10 (5 Cir. 1957; *National Labor Rel. Bd.* v. *Textile Machine Works*, 214 F.2d 929, 932 (3 Cir. 1954).

The principal evidence supporting the Board's finding was supplied by testimony of several of the former employees and by a certain John Hayes, a quality control inspector at the Loring Air Force base in Maine. All of these witnesses testified to certain colloquies which each

had with the respondent's assistant superintendent, Gordon V. Atwater, concerning respondent's hiring policies.[3]

The first of the former employees to testify at the hearing was Gregory Roix. He testified that after asking Atwater whether the former employees would be rehired, Atwater told him that the "Company" [had] bid so low they couldn't afford to pay the union wages." Roix also testified that Atwater had adverted to the fuel losses but had concluded the conversation by stating "that after September 30 that there would be no union on the pipeline because the company was against unions."

Raymond Edgecomb, another McGraw employee, related a conversation which he had with Atwater in the latter's office. "Q. All right. Will you tell the Trial Examiner what Mr. Atwater said to you and what you said to him? A. Mr. Atwater told us that we wasn't to be rehired. I asked him why. He said the new company had taken the bid so low that they couldn't pay the union wage, and they wanted to break the union; and he said they was going to. The excuse they was using was the excessive loss of gas."

Steward Stockford, another witness for the Board, testi-

[3] At oral argument respondent raised the question of whether Atwater's statements could be properly attributed to the Company as reflecting management policy. In short, was he a "speaking agent" whose authority was such that his statements could be attributed to his principal. Cf. Restatement of Agency 2d, § 288. We believe that this question must be answered in the affirmative. Atwater was the assistant superintendent of the entire pipeline operation. Though respondent in its answer to the Board's complaint denied that Atwater had any authority to hire, it admitted that he had authority to recommend the disciplining of employees and to recommend the adjustment of grievances and to that extent could be deemed a "supervisor" within the meaning of Section 2(11) of the Act. Moreover, Erwin, the respondent's superintendent, testified that at the time he hired Atwater he discussed the Company's hiring policy with him. Most significantly, Erwin testified that he expressly delegated the authority to hire to Atwater. Consequently, we believe that there is ample evidence to show that Atwater's statements could be validly attributed to respondent as bespeaking company policy.

fied to a conversation which he had with Atwater in the presence of Hayes and Edgecomb. "Q. Will you tell the Trial Examiner what was said at this time and by whom? A. Well, Mr. Atwater said that we were not going to be rehired by the new contractor, and he said they were going to hire all new men, that they didn't want any union men there, that they were going to try to break the union."

John Hayes, the Air Force quality control inspector, testified that Atwater had originally told him that he "planned on rehiring all of the present employees if [he] would be allowed by the new contractor." Thereafter, Hayes was told by Atwater that the reason that he wasn't permitted to hire the former McGraw employees was "Because they were members of the Union and were on union scale." Hayes also testified that he was told by William Erwin, the respondent's superintendent, that "this [the pipeline operation] was going to be a non-union shop on the first of October."[4] (The date on which respondent succeeded the McGraw Company).

As noted previously, it was the respondent's position that its decision not to hire the former employees was based solely on the fact of the gasoline losses which had occurred on the pipeline during the McGraw management.

Relative to this defense, the record indicates that respondent had received some information of a general nature that losses had occurred during the McGraw operation. However, as the Board pointed out, "Not until after the respondent had openly made it clear that none of the employees on McGraw's payroll would be hired by it, did it come into possession of actual figures of so-called 'losses' "

[4] We recognize that, by itself, this remark could scarcely be held to be invidious or violative of the Act. It is, at worse, an ambiguous statement whose coherence can only be supplied by the context of other facts and circumstances. The respondent would be within its rights to use all *lawful means* to render the pipeline a non-union operation. Whether its activities were so circumscribed is the question.

More significantly, two government inspectors who testified on this point, stated that losses were in fact "normal" and were reasonably to be anticipated as a result of the influence of variations in temperatures, evaporation and tank cleaning and mixing. Moreover, the record is barren of any evidence that the government itself raised any question as to the "losses" or that McGraw was in any way penalized for them. The government inspector testified that none of the losses were regarded as unacceptable at the central records keeping depot of the Air Force at Middletown, Pennsylvania. Finally, Superintendent Erwin admitted that he was fully aware that all reports of losses submitted during McGraw's operation of the pipeline had been approved by the Air Force.

With the evidence thus in equipoise, we cannot say that the Board's findings that respondent discriminatorily refused to hire the former McGraw employees lack substantial evidence. *National Labor Relations Board* v. *Walton Manufacturing Company, and Loganville Paints Company; National Labor Relations Board* v. *Florida Citrus Canners Cooperative*,—U.S.—,decided April 9, 1962. Respondent admitted that it was "normal procedure" both for the preceding contractors operating the pipeline at issue, and for itself at its other operations, to retain the personnel of the prior contractor. Despite the presence of a pool of experienced workers, respondent went to considerable length to replace the union employees with entirely new workers—most of whom had no previous experience on pipeline operations. Indeed, to train the new workers, respondent transported some employees from as far away as its Californian operations. Finally, we note that all of respondent's far flung affiliates function as "non-union" operations. Taken in context, we believe that it can be fairly said that if not the only reason, the substantial or motivating reason for the respondent's refusal to hire the

former employees resided in the fact that the employees were members of the union. As such the respondent's action clearly violates Section 8(a) (3) and (1) of the Act. *National Labor Relations Bd.* v. *Whitin Machine Works*, 204 F.2d 883 (1 Cir. 1953).

Both the Trial Examiner and the Board found that the above cited statements of Atwater were attempts to intimidate the applicants in the exercise of their statutory rights and that these statements constituted a separate violation of Section 8(a) (1) of the Act. We believe that on their face, such statements could well be found to constitute interference, restraint and coercion with union activity within the meaning of Section 8(a)(1) of the Act and that substantial evidence supports the Board's findings in this regard. See *National Labor Rel. Bd.* v. *Saxe-Glassman Shoe Corp.*, 201 F.2d 238, 242 (1 Cir. 1953); *National Labor Relations Board* v. *Brezner Tanning Co.*, 141 F.2d 62, 64 (1 Cir. 1944).

The respondent did offer employment to three of the former employees, Elwood Webster, Stanley Sarnacki and Gregory Roix. The offers were made to these men while the McGraw contract was still in force. Each of the men accepted the offer. While there were some indications that the respondent was going to proceed with an essentially non-union crew, the record indicates that the situation in this regard was still fluid at the time that the offers were tendered and accepted. Thereafter, on September 30, the final day of the McGraw contract, a union organizer called Roix and told him that it was now obvious that the three men were to be the only employees who would be hired by the respondent. This call, through apparently devoid of coercion, made it clear that the three men would have to make a decision and either cast their lot with the respondent or stick with their fellow union members. The three chose the latter and communicated their decision not to report

for work to the respondent, making clear, at least by implication, that their reason for declining employment was the respondent's policy *vis a vis* the other employees. The record indicates that respondent understood why these individuals were withholding their services.

On these facts a majority of the Board found that the men had accepted respondent's offer of employment and, subsequently, had only withheld their services in protest over respondent's refusal to employ their co-workers. Consequently, under the Board's view "the three employees became unfair labor practice strikers entitled to immediate employment upon their unconditional offer to abandon the strike."

Respondent resists this finding on the basis that the men had never actually effectuated an employer-employee relationship with the company and therefore could not "strike" against it.

Under the facts of the instant case, we cannot accept respondent's position. It is well settled that the terms "mutual aid" and "concerted activities" as used in Section 7 of the Act "include the right to join other workers in quitting work in protest over the treatment of a co-employee, or supporting him in any other grievance connected with his work or his employer's conduct." *Carter Carburetor Corp. v. National Labor R. Board*, 140 F.2d 714, 718 (8 Cir. 1944).

It is true that these men never actually reported to work for respondent. However, it is equally true that but for the company's illicit policies and acts they would have done so incident to their antecedent agreements. Moreover, as the Board pointed out in its footnote 1 to its decision and order "These three workers were not strangers to respondent's operations . . . They were, at the time of respondent's unfair labor practices, performing precisely the same jobs for the previous pipeline operator. They had applied for

continued employment with respondent, and their decision to join the strike came only after respondent had accepted their applications and invited them to work . . . Under the act, even an applicant for employment is an 'employee' with respect to the provisions prohibiting discrimination. *Sir Utah Construction Co.*, 90 N.L.R.B. 196, 203; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177."

We agree with the Board's determination in this regard. The men had accepted respondent's offer and were actually working on the pipeline on September 30. On October 1 when respondent assumed responsibility for the operation of the pipeline if they had reported to work, for however brief a period, and then left in protest over the respondent's activities they would clearly be unfair labor practice strikers. However, we perceive no significant reason why a different result should obtain here. On the present record to insist on a requirement that the three men physically report to the job before going on strike would be little more than an empty gesture.

Finally, respondent urges that a procedural irregularity infected the proceeding before the Board. In argues that the Trial Examiner committed prejudicial error in denying the respondent opportunity to impeach and attack the credibiilty of a key Board witness. However, we do not believe that it is now open to us to consider this issue. Respondent filed an extensive list of exceptions to the Intermediate Report of the Trial Examiner with the Board. The point now sought to be urged here was not filed among these exceptions.

Section 102.46 of the Rules and Regulations of the National Labor Relations Board, promulgated under the Labor Management Relations Act provides in pertinent part that:

"EXCEPTIONS TO THE RECORD AND PROCEEDINGS

"SEC. 102.46. *Exceptions or supporting briefs, time for filing; where to file; service on parties, extension of*

time; effect of failure to include matter in exceptions; oral arguments.—(a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, . . . any party may . . . file with the Board in Washington, D.C., seven copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with seven copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file seven copies of a brief in support of the intermediate report and recommended order. . . .

"(b) *No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding.* (Italics ours) . . . ."

We believe that this rule sets forth an eminently sound philosophy of orderly administrative and appellate procedure which should be stringently adhered to. Unquestionably it is grounded on the promise that the Board should be alerted by counsel to those errors which may have prejudiced a particular proceeding, and, more significantly, that the Board might assume that counsel only intends to urge those points which are contained in its exceptions. Where this policy is disregarded, and a point not argued before the Board is subsequently urged in a reviewing court, that court is effectively deprived of the deliberations and reasoned analysis of a vital agency whose expertise is always relevant in the quest for the evolution of a sound body of labor law.

Finally, in this court, the respondent attacks the broadness of the Board's order. However, while respondent excepted to the order recommended by the Trial Examiner

this exception apparently related more to the sufficiency of the evidence supporting the order than its broadness. As we now find the evidence supports the order, we believe that the order must stand. *Marshall Field & Co. v. Board*, 318 U.S. 253, 255-256 (1943); see also, *Carpenter's District Council of Detroit, Etc. v. N.L.R.B.*, 285 F.2d 289 (D.C. Cir. 1960).

An order will be entered enforcing the order of the Board.

Appendix B

Section 10(e), National Labor Relations Act: (Section 158(e) of Title 29 of U. S. Code).

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member agent or agency the court may order such additional evidence to be taken before the Board.

its member, agent, or agency and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

Appendix C

Section 102.46 National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8:

"Sec. 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.* (a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(c) of the act and section 102.113 and section 102.114 of these rules) file with the Board in Washington, D.C., seven copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motion or objections), together with seven copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period file seven copies of a brief in support of the intermediate report and recommended order. Copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation *of page and line* the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave or for extension of time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties. Requests for an extension must be received by the Board 3 days prior to the due date.

"(b) No matter not included in a statement of excep-

tions may thereafter be urged before the Board, or in any further proceeding.

"(c) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions filed pursuant to the provisions of paragraph (a) of this section with proof of service on all other parties furnished with such request. The Board shall notify the parties of the time and place of oral argument, if such permission is granted.

"(d) Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

"(e) Exceptions to intermediate reports and recommended orders, or to the record, briefs in support of exceptions, and briefs in support of intermediate reports and recommended orders shall be legibly printed or otherwise legibly duplicated: *Provided, However,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

NEW ENGLAND TANK INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 315

NEW ENGLAND TANK INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 8–18) is reported at 302 F. 2d 273. The Board's decision and order (B.A. 2–24)[1] are reported at 133 NLRB No. 25.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1962 (Pet. 8–18), and a petition for rehearing was denied on May 15, 1962 (Pet. 2). The petition for certiorari was filed on August 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "B.A." refers to the appendix to the Board's brief in the court below; "R.A." to the appendix to petitioner's brief.

QUESTIONS PRESENTED

1. Whether the Board's finding that Roix, Sarnacki and Webster were employees of petitioner at the time they declined to work because of petitioner's discriminatory refusal to hire other employees is supported by substantial evidence.

2. Whether the court below properly held that it was barred from considering petitioner's objections to an evidentiary ruling made by the Trial Examiner during the unfair labor practice hearing because petitioner had failed to raise the issue before the Board.

STATUTES AND RULES INVOLVED

The relevant statutory provisions and rules are set forth at pp. 19–22 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner Company operates pipelines and petroleum tank farms in connection with the transportation of aviation fuel and related products (B.A. 11; 26, 42). In August 1960, the Company obtained a contract for the operation of a 200-mile pipeline, owned by the United States Government, between Searsport and Limestone, Maine (B.A. 11–12; 28–29). Under the contract, which is let every year, the Company's obligation was to operate and protect the pipeline (B.A. 12; 29). During the previous contract year, F. H. McGraw Company operated the pipeline and had in its employ all of the employees involved in this proceeding (B.A. 12; 44; 45). McGraw and its predecessors had since 1958 recognized and entered into collective bargaining agreements with the two unions

involved in this case.[2] Petitioner knew that the unions were recognized by McGraw (B.A. 14; 29).

On August 26, when the Company was awarded the contract to operate the pipeline, the Plant Protection union requested that it negotiate a contract on behalf of the guards who were employed by McGraw (B.A. 14; 182). The same day the Company, which was concerned because of alleged fuel losses sustained by McGraw (B.A. 14–16; 29, 32, 115–117, 134–135), contracted with a detective agency to provide about 16 guards for round-the-clock protective duties (B.A. 14; 91–94, 195–197). On September 15, the Company's superintendent, William Erwin, advised the Plant Protection union that the Company would not employ those persons being used by McGraw as guards; the Company gave the union no reason for the decision (B.A. 14; 37, 99, 107, 118, 184–185).

On September 16, Erwin hired Gordon V. Atwater, who had worked at the pipeline for six years, as assistant superintendent (B.A. 44, 113). Erwin told Atwater that there was a "possibility" that none of the McGraw guards or operators would be hired because of the "stock loss structure of the system" (B.A. 16; 113–114, 134). Erwin also told Air Force Inspector John Hayes that the Company was a "non-union shop" and that the "shortage situation all along the pipeline and at both terminals was too extensive and something would have to be done about it" (B.A. 62). At the same conference, Atwater told Hayes

[2] Independent Union of Plant Protection Employees in the Electrical and Machine Industry; and Oil, Chemical & Atomic Workers, International Union, AFL–CIO, Local 14–366.

that he (Atwater) planned to rehire "all of the present employees" of McGraw if permitted to do so "by the new contractor" (B.A. 62). Later, however, he told Hayes that he was not going to be permitted to hire any of the employees except Roix and Webster (the most experienced employees and the oldest in seniority) because the employees were "members of the union" (B.A. 63).

On September 19, Atwater told two McGraw employees when they reported to work that the Company "had taken the pipeline bid so low that they couldn't pay the union wage, and they wanted to break the union, and he said they was going to. The excuse they was using was the excessive loss of gas" (B.A. 15; 54–55). Atwater also told McGraw employee Roix that he, Atwater, was the only McGraw employee that the Company was going to hire because "the company bid so low they couldn't afford to pay the union wages," that the employees "must have been selling fuel to the families on the outside," and that the "employees weren't running the pipeline [e]fficiently" (B.A. 15; 47).

At about the same time, the Company placed advertisements in the Bangor newspaper soliciting applications for "Unskilled Workers (Male)—Many" and inviting interviews (B.A. 14; 189). All the McGraw employees later involved in the Board proceedings immediately presented their applications, which were among some 200 received (B.A. 67–68, 132).

Thereafter, on September 23, Atwater told Roix and Webster that Erwin had given him permission to hire "anyone he saw fit" and that all the Limestone em-

ployees were hired (B.A. 49–50): However, the next night Atwater told Roix that everything had changed and that just he—Atwater—Roix and Webster were being rehired and that none of the other employees would be considered. Atwater asked Roix and Webster if they would accept the jobs and they said they would (B.A. 51). Atwater then explained that the Company's lawyers had advised that the Company must hire "a certain percentage of union men" (B.A. 52). Atwater added, however, that "after September 30 * * * there would be no union on the pipeline because the company was against unions" (*ibid.*).

On September 30, the day before the Company was to commence operation of the pipeline, Oil Workers Representative Neilson telephoned Roix and told him that of all the McGraw employees only Roix and Webster at Limestone and Sarnacki at Searsport "were asked to go to work" (B.A. 2, 18; 52–53). Neilson then told Roix, "I can't tell you not to go to work, but if you want to stay with the union, you suit yourself" (B.A. 53). Roix decided to "stay with the rest of the boys" (*ibid.*). About the same time, Sarnacki telephoned Erwin and told him that "for reasons that [Erwin] should understand * * * [Sarnacki] would not be able to take the job" (B.A. 115).[3] Neither Roix, Webster, nor Sarnacki went to work (B.A. 114–115, 134).[4]

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[3] According to the testimony of Company Superintendent Erwin, Sarnacki had accepted the job on September 26, filling out a tax withholding form (B.A. 115).

[4] The Company stipulated that all three failed to report to work for the same reason (B.A. 139).

In the meantime, on September 21, the secretary-treasurer of the Oil Workers Union, wrote to the Company's president, and asked him to set a date for negotiating a collective bargaining agreement (B.A. 14; 186–187). On the same day, however, the Company's attorney had written to Neilson, the Oil Workers International representative, pointing out that the Company could not predict whether it would recognize the Oil Workers union and that it was concerned over "serious shortages" appearing to be attributable "either to pilferage, mismanagement, or both" (B.A. 187–188). Although the Company had hired some 50 persons by November 1960, this number included none of the unionized McGraw employees, either guards or operators (B.A. 125).[5]

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company discriminatorily refused to employ or re-employ the former McGraw employees, in violation of Section 8(a) (3) and (1) of the Act, because they were union members (B.A. 2, 13). In so doing, the Board rejected the Company's contention that its decision not to hire these employees was based on losses experienced by the preceding contractor, McGraw, which were chargeable to the employees. The Board also found that Webster, Sarnacki and Roix had accepted the Company's offer of employment but subsequently withheld their services in protest over the Company's refusal to employ their co-workers, and therefore that the three employees became unfair labor

[5] Except for Roix, Webster, and Sarnacki, discussed *supra*.

practice strikers entitled to immediate employment upon their unconditional offer to abandon the strike (B.A. 2–3, 18).[6]

The Board ordered the Company to cease and desist from the unfair labor practices found (B.A. 3–4). Affirmatively, the order required the Company to offer the employees the jobs they would have had but for the discrimination against them (the offer to Roix, Webster and Sarnacki being contingent upon their unconditional reapplication); to make the applicants whole for wages lost as a result of the discrimination, and to post appropriate notices (B.A. 4–5).

C. THE DECISION OF THE COURT OF APPEALS

The court below upheld the Board's unfair labor practice findings as supported by substantial evidence, and enforced the Board's order in full (Pet. 8–18).

ARGUMENT

1. Petitioner's sole contention on the merits of the case is that the Board erred in treating Roix, Webster and Sarnacki as unfair labor practice strikers because, since they had never accepted the Company's offer of employment, the Company could have no reinstatement and back pay obligation to them (Pet. 5–6). However, the issue of whether, absent an employment relation, individuals who refuse to work in protest

[6] Board Member Rodgers dissented from this finding (B.A. 6–8). The Board also found without dissent that the threatening and warning statements about unions addressed to the employees by Assistant Superintendent Atwater were attempts to intimidate the applicants in the exercise of their statutory rights, and thereby violated Section 8(a)(1) of the Act (B.A. 2, 18).

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against an employer's unfair labor practices may be treated as "employees" for purposes of the Act is not presented here.[7] The Board found (B.A. 3, n. 1), and the court below accepted the finding (Pet. 16), that the three employees had accepted employment with the Company and thereafter decided to quit work in protest over the Company's discriminatory refusal to rehire their fellow employees.[8] Petitioner's contention is thus merely an attack on this factual finding. Such an evidentiary issue does not warrant review by this Court, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the evidence detailed in the Statement demonstrates that there is ample support for the Board's finding. Thus, Assistant Superintendent Atwater told Air Force Inspector John Hayes that, while the Company would not permit him to hire other McGraw employees, he was being permitted to hire Roix and Webster (B.A. 62–63). Later, on September 24, Atwater told Roix that, while the others would not be considered, Roix and Webster were being rehired (B.A. 50–52). Atwater asked Roix and Webster if they would accept the jobs, and they said

[7] But see *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177.

[8] Accordingly, the Board properly concluded that, by withholding their services in protest over the Company's unlawful refusal to employ their co-workers, the three men became unfair labor practice strikers, and as such, are entitled to reinstatement upon application. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 278.

that they would (ibid.).[9] And, on September 26, Sarnacki was added to this group (n. 3, *supra*). It was only afterwards that the three men declined to work because of the Company's refusal to employ their co-workers.

On these facts the Board was warranted in concluding that, although the three employees had never reported for work with the Company, they had, by accepting the Company's job offers, in fact established an employment relationship with the Company. As the court below observed (Pet. 16):

> The men had accepted respondent's offer and were actually working on the pipeline on September 30. On October 1 when respondent assumed responsibility for the operation of the pipeline if they had reported to work, for however brief a period, and then left in protest over the respondent's activities, they would clearly be unfair labor practice strikers. However, we perceive no significant reason why a different result should obtain here. On the present record to insist on a requirement that the three men physically report to the job before going on strike would be little more than an empty gesture.

2. There is no substance to petitioner's contention (Pet. 4–5) that the court below erred in concluding that it was barred from considering an evidentiary

[9] Roix testified (B.A. 2. 18; 51): "[Atwater] asked me and Webster if we would accept the job, and Webster asked him for an hour off so he could get in contact with our union representative, which is William Neilson. So Webster came back and said that we had, told Mr. Atwater that we would accept the job."

ruling made by the Trial Examiner because petitioner had failed to contest that ruling on appeal to the Board. In the disputed action, the Trial Examiner, during the course of the unfair labor practice hearing, ruled that counsel for petitioner could not, in cross-examination of a Board witness, question him about what he had previously said to a Board investigator respecting events which he testified to on direct examination (R.A. 216–218).[10] Petitioner raised no objection to this ruling in its exceptions to the Trial Examiner's Intermediate Report (Pet. 3, 16), but did seek to raise the issue on review of the Board's order in the court of appeals. In so doing, petitioner failed to comply with Section 102.46(b) of the Board's Rules and Regulations which provides "[n]o matter not included in a statement of exceptions [to the Intermediate Report] may thereafter be urged before the Board, or in any further proceeding."[11] In these circumstances, the court below was correct in concluding that, giving effect to the letter and purpose of the Board's rules of practice, "it is [not] now open to us to consider this issue" (Pet. 16).

[10] Petitioner's counsel was attempting to impeach the credibility of the witness by seeking to establish an inconsistency between the witness' testimony on direct examination and a prior statement given to a Board agent. Board counsel at the hearing offered to furnish the actual written statement made by the witness, but petitioner's counsel insisted on probing the witness' recollection. The Trial Examiner, apparently of the view that the written statement itself was the best evidence of what the witness had previously said, cut off the line of inquiry (R.A. 216–218).

[11] *NLRB Rules and Regulations and Statements of Procedure, Series 8*, effective November 13, 1959, as amended, Sec. 102.46(b) (Pet. 21–22).

Nor was the court required to disregard the Board's Rules and consider the issue because Section 10(e) of the Act (29 U.S.C. 160(e)) (Pet. 19–20) provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."[12] This provision of the Act and the decisions of this court interpreting it (*National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253), contemplate that the Board, like any other appellate body, will be apprised of the specific questions which the appellant intends to press and afforded an opportunity "to consider on the merits questions to be urged upon review of its order" (*Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. at 255, 256). See *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

The obvious purpose of Section 10(e) of the Act and Section 102.46(b) of the Board's Rules is to adopt the customary appellate procedure whereby the appellate tribunal (here, the Board) is not required to "search the record for alleged errors not pointed out by appellant" (*Litton* v. *United States*, 177 F. 2d 416, 418 (C.A. 8), certiorari denied, 339 U.S. 921), or

[12] Petitioner makes no attempt to bring its case within the exception of Section 10(e) by showing that its failure to contest the evidentiary ruling before the Board is excused by extraordinary circumstances. It says only that the omission was "inadvertent" (Pet. 3).

"search for error not * * * formally specified" (*Purifoy* v. *United States*, 170 F. 2d 144, 145 (C.A. 5)). The raising of an objection at the hearing, as with registering an objection before a trial judge, serves to give the trier of fact an opportunity to correct any error, and to preserve the question for possible review on appeal. It does not, however, as petitioner argues (Pet. 4), apprise the Board of the objection or obviate the necessity for indicating, by specific timely exceptions, which of the alleged errors at the hearing the party desires to urge on appeal.[13] As pointed out by the Seventh Circuit in *Kovach* v. *National Labor Relations Board*, 229 F. 2d 138, 143 (C.A. 7): "If we should hold that we will review matters raised before the Hearing Examiner, even though not considered by the Board, because the Examiner is an 'agent' of the Board, we would virtually destroy § 102.46(b) of the Board's Rules. The Board could hardly continue to consider only those issues in the Intermediate Report to which formal exception is taken if the courts are going to review everything raised before the Hearing Examiner."

[13] "Filing exceptions is tantamount to filing a notice of appeal * * *." *Kiekhaefer Corp.* v. *National Labor Relations Board*, 273 F. 2d 314, 317 (C.A. 7), certiorari denied, 362 U.S. 950.

No different conclusion is warranted here because petitioner's objection to the Trial Examiner's ruling afforded "automatic exception" thereto. Cf., Rule 46, Fed. R. Civ. Proc. The provision for an automatic exception preserves the question for review. The issue must still be made a part of the exceptions filed before the appellate body if review is desired there or in a further appeal proceeding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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